UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

C-14J

FEB 23 2017

VIA ELECTRONIC MAIL
AND FIRST-CLASS MAIL

Frank L. Merrill
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Re: Request for EPA Employee Testimony in *Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation v. The Dayton Power and Light Company, et al.*, U.S. District Court for the Southern District of Ohio, Case, No. 3:13-cv-115

Dear Mr. Merrill:

I am responding to the above-referenced request, dated February 8, 2017, in connection with *Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation v. The Dayton Power and Light Company, et al.*, in the United States District Court for the Southern District of Ohio, No. 3:13-cv-115 (the "*Hobart* litigation"). For the reasons set forth below, the United States Environmental Protection Agency, Region 5 (EPA, or the Agency"), hereby denies your request for EPA testimony.

The Agency's *Touhy* regulations at 40 C.F.R. Part 2, Subpart C, contain restrictions on EPA employees testifying regarding official matters in any proceeding where the United States government is not a party. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The *Touhy* regulations were promulgated in 1985 to preserve limited Agency resources and Agency control over those resources. As such, they seek to strike an appropriate balance between a litigant's legitimate right to conduct discovery and uncover material reasonably calculated to lead to the discovery of admissible evidence, and the EPA's strong institutional interest in maintaining appropriate control over its workforce, fulfilling its statutory obligations, and avoiding entangling its employees in purely private litigation. The purpose of the regulations is "to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes, and to

establish procedures for approving testimony or production of documents when clearly in the interests of EPA." 40 C.F.R. § 2.401(c).

Under 40 C.F.R. § 2.402(b), no EPA employee may provide testimony concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee. Under 40 C.F.R. §§ 2.403 and 2.404(a), the General Counsel or his designee, in consultation with the appropriate Assistant Administrator or Regional Administrator, determines whether compliance with a request or a subpoena for testimony "***would clearly be in the interests of EPA***." As the designee of EPA's General Counsel for EPA Region 5, I am responsible for making these determinations for Region 5 employees.

I have reviewed the request and have considered the recommendation of the Acting Director of Region 5's Superfund Division and the immediate supervisors of the three EPA employees named in your request for EPA testimony. I have also consulted with the Regional Administrator for Region 5. I have concluded that approval of your request for EPA testimony would not clearly be in the interests of EPA. Your request would impose an undue burden upon EPA to use one or more EPA employees' official time to provide testimony and documents. Likewise, your request would impose an undue burden upon EPA by requiring public funds—in the form of Ms. Cibulskis's, Ms. Patterson's, and Mr. Renninger's official time—to be spent for private purposes. Moreover, to interject the United States into private party litigation of this type would set a precedent for the Agency that would undoubtedly lead to numerous similar requests and interfere with the official duties of Agency personnel, which, as a matter of course, do not include testifying in private lawsuits to which the United States is not a party.
Furthermore, I have determined that providing the EPA testimony that you requested is not clearly in the interests of EPA because most, if not all, of the information sought by your request can be found in publicly available documents or in the administrative record for the Site. EPA should not be required to undertake the substantial burden of producing a witness to provide information that is available through less burdensome means. *See* 40 C.F.R. § 2.406 (Requests for authenticated copies of EPA documents); 50 Fed. Reg. 32,386 (Aug. 9, 1985)

In addition, I have determined that providing the testimony sought by your request is not clearly in the interests of EPA because it risks improper exposure of the Agency's ongoing deliberations and improper judicial review of the Agency's actions. To the extent that the testimony sought relates to pre-decisional Agency information, that information is not subject to judicial review and it may be protected and immune from discovery under the government's deliberative process privilege. In addition, CERCLA Sections 113(h) and 113(j) limit the timing and scope of judicial review of EPA's removal and remedial actions and orders, with such review to be confined and based on the administrative record compiled by EPA.

Further, the lawsuit for which you seek EPA employee testimony concerns a dispute to which the Agency is not a party and the outcome of which will have no significant effect

upon EPA's programs, functions, or responsibilities. Permitting an EPA employee to give testimony in this lawsuit could be perceived as a failure by the Agency to maintain impartiality among litigants in an action to which the Agency is not a party.

In your February 8, 2017, request, you argue that EPA employees should be allowed to testify in the *Hobart* litigation because: (1) the three EPA employees, as the past or current remedial project managers for the ongoing remedial action at the site (Ms. Cibulskis and Ms. Patterson) and the current on-scene coordinator for the ongoing removal action at the site (Mr. Renninger), are the EPA employees most familiar with the history and current response actions ongoing at the site, and their testimony is critical in presenting a complete and accurate picture of the site; (2) plaintiffs in the *Hobart* litigation named the three EPA employees as potential witnesses on their original lay witness list, and, thus far, only plaintiffs have been privy to the factual findings of EPA through their communications with EPA to date; and (3) EPA has repeatedly demonstrated an interest in the *Hobart* litigation, and it is in EPA's interest to seek resolution of the *Hobart* litigation.

With respect to your first argument, there are no relevant facts in EPA's possession essential to the defense (or to the prosecution) of the contribution action that the parties in *Hobart* are litigating that are not already a matter of public record or subject to requests for information under the Freedom of Information Act (FOIA). EPA's position on remedial or removal clean-up issues at the site are, or will be, memorialized in decision documents with supporting administrative records containing the documents that EPA considered or relied upon in formulating its official position; by contrast, the testimony of an EPA witness regarding information acquired in the course of performing his or her official duties does not necessarily reflect EPA's official position. 40 C.F.R. § 2.401.

With respect to your second argument, it is EPA's understanding that, on February 3, 2017, plaintiffs in the Hobart litigation served other parties with an amended lay witness list with the names of the five current and former EPA employees omitted. Furthermore, to the extent that EPA conducts oversight of the remedial or removal actions at the South Dayton Dump Superfund Site being performed by the *Hobart* plaintiffs under the frameworks embodied in administrative settlement agreements, the terms, schedules, requirements, payment of EPA's oversight costs, communications among the parties in the performance of the settlement agreements, and deliverables generated under those settlement agreements are already a matter of public record or subject to the FOIA.[1]

---

[1] On April 21, 2016, your office submitted a FOIA request to EPA Region 5 for all releasable Agency records relating to the South Dayton Dump Superfund Site that encompasses the type of information sought by your current request for testimony. EPA responded to your FOIA request (EPA-R5-2016-005983) in two phases, on August 18, 2016, and on November 7, 2016. While EPA reserves the right to convert your request for EPA testimony into a new FOIA request under the *Touhy* regulations, EPA will not do so—given the largely duplicative nature with FOIA request EPA-R5-2016-005983—unless you request such a conversion.

Finally, EPA takes no position on either the merits of the *Hobart* litigation, or on the desirability of any particular outcome of the *Hobart* litigation, whether through settlement or judicial disposition. While EPA is certainly interested in the litigation, that interest does not compel us to provide EPA personnel for depositions to enable a party to obtain information that is otherwise available through means much less burdensome to the Agency.

Accordingly, for the reasons explained above, I have determined that it would not clearly be in EPA's interests to permit Karen Cibulskis, Leslie Patterson, or Steve Renninger to provide deposition testimony pursuant to your request. Consequently, EPA does not authorize the three EPA employees named in your request of February 8, 2017, or any other EPA employee, to testify in the above-referenced matter.

Thank you for your courtesy and cooperation in this matter. If you have any questions, please contact Associate Regional Counsel James Morris of my staff.

Sincerely yours,

T. Leverett Nelson
Regional Counsel